

Chan Boi Loi v Public Bank Bhd and another application

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FEDERAL COURT (PUTRAJAYA) — CIVIL APPLICATION NOS
08–243 OF 2007(C) AND 08–245 OF 2007(C)

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ZAKI AZMI CHIEF JUSTICE, ZULKEFLI AND GOPAL SRI RAM
FCJJ

9 SEPTEMBER 2009

Banking — Securities for advances — Loan secured by charge — Lender's right of action — Whether lender may pursue all remedies available simultaneously — Whether lender's right of action in personam for recovery of loan postponed until after foreclosure proceedings

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Land Law — Charge — Enforcement of — Whether lender's right of action in personam for recovery of loan postponed until after foreclosure proceedings

The respondent bank had lent monies to the applicants. The loans were secured by two registered charges containing a clause ('the clause') stating that if the amount realised by the bank on a sale of the charged property is less than the amount due to the bank, the applicant shall be liable to pay the bank the balance due to the bank. The respondent commenced an action against the applicants' to recover the loans before proceeding under the charges. The applicants argued that due to the clause, the respondent bank had to take foreclosure proceedings to have the lands sold off before enforcing the applicant's promise to repay the loan. The High Court agreed with the applicants and dismissed the bank's suit. The Court of Appeal allowed the bank's appeal and reinstated the suit. The applicants thus sought leave to appeal to the Federal Court.

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Held, dismissing the applications with costs:

- (1) A lender is entitled to pursue all remedies available against a borrower simultaneously, contemporaneously or successively to recover the money lent unless there is an agreement to the contrary. Such an agreement is not to be implied from a clause in an annexure to a charge, such as the clause in the present instance. All that a clause in those terms does is to create a right in the lender to recover the balance outstanding in the event that a sale of the charged property produces a shortfall. It is not an agreement by the respondent to postpone its right to bring an action in personam for the recovery of the whole sum lent (together with interest) until after the charged land has been sold (see para 8).

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- A (2) The contracts of loan stood independently as separate contracts of debt for the breach of which the respondent brought its action as it was indeed entitled to do (see para 9).

[Bahasa Malaysia summary]

- B Responden telah meminjamkan wang kepada pemohon-pemohon. Pinjaman-pinjaman tersebut dijamin dengan dua gadaian berdaftar yang mengandungi klausa ('klausa tersebut') menyatakan sekiranya jumlah yang diperolehi bank daripada jualan hartanah yang digadaikan adalah kurang daripada jumlah yang terhutang dengan bank, pemohon bertanggungjawab untuk membayar kepada bank baki yang terhutang dengan bank.
- C Responden telah memulakan tindakan terhadap pemohon-pemohon untuk mendapatkan semula pinjaman-pinjaman tersebut sebelum prosiding di bawah gadaian tersebut. Pemohon-pemohon berhujah bahawa mengikut klausa tersebut, responden hendaklah mengambil prosiding halang tebus bagi menjualkan tanah-tanah tersebut sebelum menguatkuasakan akujanji pemohon-pemohon untuk membayar semula pinjaman. Mahkamah Tinggi bersetuju dengan pemohon-pemohon dan menolak guaman responden. Mahkamah Rayuan membenarkan rayuan responden dan mengekalkan guaman tersebut. Pemohon-pemohon justeru mendapatkan kebenaran merayu daripada Mahkamah Persekutuan.
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Diputuskan, menolak permohonan-permohonan dengan kos:

- F (1) Pemberi pinjaman berhak meneruskan segala remedi yang ada terhadap peminjam secara bersama atau berturut-turut untuk mendapatkan semula wang yang dipinjamkan melainkan terdapat perjanjian yang menyatakan sebaliknya. Perjanjian sebegini tidak boleh dianggap tersirat daripada klausa dalam lampiran kepada gadaian, seperti klausa di dalam kes ini. Klausa di dalam terma tersebut hanyalah berfungsi untuk memberikan hak kepada pemberi pinjaman untuk mendapatkan semula baki yang tertunggak sekiranya jualan hartanah yang digadaikan menghasilkan kekurangan. Ianya bukanlah perjanjian oleh bank untuk menangguhkan haknya untuk mengambil tindakan in personam bagi mendapatkan semula kesemua jumlah yang dipinjamkan (bersama dengan faedah) sehingga tanah yang digadaikan itu telah dijual (lihat perenggan 8).
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- I (2) Kontrak pinjaman secara tersendiri dianggap sebagai kontrak-kontrak hutang berasingan bagi pelanggaran di mana responden mengambil tindakan seperti mana ia berhak berbuat sedemikian (lihat perenggan 9).]

Notes

For cases on enforcement of charge, see 8(1) *Mallal's Digest* (4th Ed, 2010 Reissue) paras 2297–2304.

For cases on securities for advances generally, see 1 *Mallal's Digest* (4th Ed, 2005 Reissue) paras 2097–2270. A

Cases referred to

- Allied Capital Sdn Bhd v Mohamed Latiff bin Shah Mohd and another application* [2001] 2 MLJ 305, FC (refd) B
- Beatrice a/p AT Fernandez v Sistem Penerbangan Malaysia & Ors* [2005] 3 MLJ 681, FC (refd)
- Datuk Syed Kechik bin Syed Mohamed & Anor v The Board of Trustees of the Sabah Foundation & Ors and another application* [1999] 1 MLJ 257, FC (refd) C
- Hongkong & Shanghai Banking Corp Ltd v Wan Mohd bin Wan Ngah* [1991] 3 MLJ 119, HC (overd)
- Leong Yick Realty Co Sdn Bhd v Asia Commercial Finance (M) Bhd* [1994] 2 MLJ 308, HC (refd)
- Low Lee Lian v Ban Hin Lee Bank Bhd* [1997] 1 MLJ 77, FC (refd) D
- Tan Kong Min v Malaysian National Insurance Sdn Bhd* [2006] 1 MLJ 601, FC (not folld)

Legislation referred to

- Limitation Act 1953 ss 6, 21 E
- Bastian Vendargon (Bastian Vendargon) for the appellant in Civil Application No 08–243 of 2007(C).*
- Vignesh Kumar Krishnasamy (Muzamil Alif bin Mohamad with him) (Balendran Chong & Bodi) for the respondent in Civil Application No 08–243 of 2007(C).*
- Mura Raju (Mura Raju & Co) for the appellants in Civil Application No 08–245 of 2007(C).* F
- Vignesh Kumar Krishnasamy (Muzamil Alif bin Mohamad with him) (Balendran Chong & Bodi) for the respondent in Civil Application No 08–245 of 2007(C).*

Gopal Sri Ram FCJ (delivering judgment of the court): G

[1] These are two applications for leave to appeal against the decision of the Court of Appeal which (by a majority) dismissed the applicants' appeal to it. Ordinarily this court does not give reasons when allowing or dismissing applications of this nature. This is encapsulated in the following observation by Edgar Joseph Jr FCJ in *Datuk Syed Kechik bin Syed Mohamed & Anor v The Board of Trustees of the Sabah Foundation & Ors and another application* [1999] 1 MLJ 257 at p 260: H

It is not the practice of this court, nor as we understand it, the practice of the House of Lords, when sitting in its judicial capacity hearing application for leave to appeal, to give explicit reasons for granting or refusing leave, save in circumstances where Their Lordships considered that they had no jurisdiction to entertain the application. I

A But there are some cases in which this has been done. See, for example, *Beatrice alp AT Fernandez v Sistem Penerbangan Malaysia & Ors* [2005] 3 MLJ 681; *Allied Capital Sdn Bhd v Mohamed Latiff bin Shah Mohd and another application* [2001] 2 MLJ 305. We consider this an appropriate case to give reasons because it raises an issue of construction of certain clauses in an annexure to the charge that appeared with frequency in the 1980's and 1990's but no longer do. The common factual matrix upon which these applications are based is as follows.

C [2] The respondent is a bank. It lent monies to the applicants. The loans were secured by two registered charges. Each charge has an annexure. It contains the following clause which is numbered as 8 in one annexure and as 16 in the other:

D If the amount realised by the Bank on a sale of the Said Land under the provisions of the National Land Code after deduction and payment from the proceeds of such sale of all fees dues costs rents rates taxes and other outgoing on the Said Land is less than the amount due to the Bank and whether at such sale the Bank is the purchaser or otherwise the Chargor(s) shall pay to the Bank the difference between the amount due and the amount so realised and until payment will also pay interest on such balance at the Prescribed Rate as aforesaid with monthly rests.

E [3] The applicants' case before the High Court was based on this clause. According to them, this clause on its true construction precludes the respondent bank from bringing an action on the covenant to repay the loan until it has sold off the charged lands and then only in the event of a shortfall.

F In other words, the respondent bank agreed take foreclosure proceedings to have the lands sold off before enforcing the applicant's promise to repay the loan. In the present case, the bank commenced an action against the applicants' on their personal covenant before proceeding under the charges. This it was not entitled to do.

G [4] The applicants resisted the respondent bank's action on the above amongst other grounds. The High Court however agreed with the applicants on the foregoing ground and dismissed the action without touching upon the other points. The bank appealed and the Court of Appeal by a majority allowed the appeal and reinstated the suit. The applicants have now come before us seeking leave to appeal principally on the ground that the decision of the Court of Appeal is contrary to established precedent. Two decisions were relied upon. The first is *Hongkong & Shanghai Banking Corp Ltd v Wan Mohd bin Wan Ngah* [1991] 3 MLJ 119 where the facts were these. The plaintiff bank in that case sought the determination of the question whether being also the chargee of property it is 'entitled at law and in equity to proceed by way of a civil suit before first realising the security under the charge and if so, whether the plaintiff is entitled to proceed concurrently on all his remedies'. The High Court answered that question in the negative and stayed the plaintiff's suit on

the ground that it was an abuse of the court's process. In doing so Lamin J (as he then was) relied on cl 8 of the charge annexure in that case which read as follows:

If the amount realised by the chargee on a sale of the said land under the provisions of the National Land Code after deduction and payment from the proceeds of such sale of all fees dues costs rents rates taxes and other outgoings on the said land is less than the amount due to the chargee and whether at such sale the chargee is the purchaser or otherwise the chargor(s) shall pay to the chargee the difference between the amount due and the amount so realised and until payment will also pay interest on such balance at the prescribed rate as aforesaid with monthly rests.

He then went on to say this:

If the chargor shall make default in respect of any of the provisions in cl 6 then in any of such case the loan etc for the time being under the charge shall immediately become payable and the chargee shall forthwith be entitled to recover the same 'and to exercise the rights and powers upon default herein this charge'. If the amount realised by the chargee on the sale of the charged land is less than the amount due to the chargee, the chargor shall pay to the chargee the difference between the amount due and the amount so realised. *So the personal liability of the chargor is only to the extent of the balance of the amount due* (cl 8). It is quite clear that upon reading the annexure as a whole both the chargee and the chargor are bound by the terms and conditions of the charge and to realise the amount owing, the land must be sold in accordance with the provisions of the National Land Code 1965 ('NLC'). If the amount realised from the sale is not sufficient to cover the amount due then it is implied that a separate action may be taken against the debtor/chargor to recover the balance should he fail to pay the chargee the difference. (Emphasis added.)

An editorial note to the report shows that an appeal to the Supreme Court was dismissed. However, no reasons were produced by that court for its decision. So, we are really in no position to discover why the Supreme Court dismissed the plaintiff's appeal. Before we state our views on the correctness of the ratio in *Hongkong & Shanghai Banking Corp Ltd v Wan Mohd bin Wan Ngah* we must discuss the other authority relied upon by counsel for the applicants. It is *Tan Kong Min v Malaysian National Insurance Sdn Bhd* [2006] 1 MLJ 601.

[5] In that case, the respondent insurance company had lent money to the appellant who had provided security for that loan by way of a registered charge over his land. The appellant defaulted in making payment of the loan. The insurance company then instituted foreclosure proceedings and had the land sold off at a public auction. But the monies it got from the sale were insufficient to satisfy the debt owed to it. So, it commenced an action to recover the shortfall. The appellant took the point that the action was barred by limitation. His failure to comply with that demand constituted a breach of the contract contained in the annexure to the charge. More than six years had passed since that breach. The lender could not therefore recover the shortfall. These arguments were rejected by this court which held, inter alia, that the relevant

- A period of limitation was 12 years and not six years. It then made the following observations upon which the present applicants place much reliance:

B At the risk of repetition, we would reiterate that the personal liability of the appellant as chargor is in respect of the difference between the amount due under the housing loan and the amount realised from the sale of the said land only and the cause of action against the appellant is only complete upon the conclusion of the sale of the said land. Indeed, if a suit is brought against the chargor before the completion of the foreclosure action and the determination that there is a balance still owing, such a suit could be struck off as being premature.

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D As is the case here, where the respondent is also a chargee of the property and the only terms that bind the parties are the terms set out in the annexure to the charge, the respondent is not entitled at law and in equity to proceed by way of a civil suit before first realising the security under the charge. The proper mode of recovery is to proceed by way of foreclosure and if there arises any difference to the amount due after deducting the amount realised from the sale, a separate action should be taken against the chargor on his personal liability to recover the balance.

E [6] In arriving at these conclusions, this court relied on the decision in *Hongkong & Shanghai Banking Corp Ltd v Wan Mohd bin Wan Ngah* and the case of *Leong Yick Realty Co Sdn Bhd v Asia Commercial Finance (M) Bhd* [1994] 2 MLJ 308 which followed it. However, the attention of this court was not drawn to the later decision in *Low Lee Lian v Ban Hin Lee Bank Bhd* [1997] 1 MLJ 77 where this court held as follows:

F Now, it is trite that a chargee/creditor may pursue any or all remedies to recover monies lent by him. He may enforce his statutory charge against the chargor by way of proceedings in rem under s 256 of the Code. He may sue the principal debtor (who may or may not be the chargor) upon the personal covenant contained in any loan agreement that was entered into between the parties. He may proceed against the surety who has guaranteed the loan. *And he may pursue all of these courses simultaneously, contemporaneously or successively.* See *China and South Sea Bank Ltd v Tan* [1989] 3 All ER 839 at p 842. (Emphasis added.)

H [7] It is clear from the statement of facts in *Tan Kong Min v Malaysian National Insurance Sdn Bhd* that the only points in the case that called for decision were (i) when the insurance company's cause of action to recover the shortfall arose and (ii) which period of limitation was to be applied, that is, the six years prescribed by s 6 or the 12 years prescribed by s 21 of the Limitation Act 1953. The observation 'where the respondent is also a chargee of the property and the only terms that bind the parties are the terms set out in the annexure to the charge, the respondent is not entitled at law and in equity to proceed by way of a civil suit before first realising the security under the charge' is pure obiter dicta and not part of the ratio decidendi. It is not to be treated as

binding authority. At the risk of repetition, *Tan Kong Min* was an action to recover a shortfall that had occurred after the sale of the security. It was not an action for the recovery of a debt due from the borrower to the lender. As for *Hongkong & Shanghai Banking Corp Ltd v Wan Mohd bin Wan Ngah*, it was clearly overtaken by the decision of this court in *Low Lee Lian v Ban Hin Lee Bank Bhd* and must be now regarded as overruled. It is of interest to note that Lamin PCA was a member of this court in *Low Lee Lian* and subscribed to a view that was at variance with that he had expressed in *Wan Mohd bin Wan Ngah's* case.

[8] We would reiterate that a lender is entitled to pursue all remedies available against a borrower simultaneously, contemporaneously or successively to recover the money lent unless there is an agreement to the contrary. Such an agreement is not to be implied from a clause in an annexure to a charge in terms of cl 8 and 16 in the present instance. All that a clause in those terms does is to create a right in the lender to recover the balance outstanding in the event that a sale of the charged property produces a shortfall. It is not an agreement by the instant respondent bank to postpone its right to bring an action in personam for the recovery of the whole sum lent (together with interest) until after the charged land has been sold. If the courts were to read such an agreement into the clauses in question it would amount to an unwarranted restriction on a lender's rights to seek the remedies open to it. The fallacy of the contrary argument is revealed by asking the question: what if the land can never be sold despite all attempts to do so? It would mean that the borrower would get away scot-free from making any payment because his answer to any action by the lender upon the covenant to pay would be that it is a condition precedent that the land be sold and a shortfall produced before any suit may be instituted. The want of logic in that proposition is sufficient to demonstrate that it is not common sense and certainly not the common law.

[9] The applicants also argue that the annexure to each charge is the only contract between the parties and the respondent bank has no alternative but to follow its terms and resort to enforcing the security before suing on the debt. With respect this submission is devoid of merit. There are two contracts of loan here evidenced by two letters of offer the terms of which were accepted by the borrowers. The letters are both dated 18 June 1982. One is in respect of an overdraft and the other for a term loan. These letters contain terms that are not to be found in the respective annexures. They therefore stand independently as separate contracts of debt for the breach of which the respondent brought its action as it was indeed entitled to do.

[10] We would conclude as follows. The decisions relied upon by the applicants do not really assist it. We therefore found this to be a case manifestly unsuitable for the grant of leave. The applications were accordingly dismissed.

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A By agreement of counsel, costs were fixed at RM7,500 per application. The deposits in court were ordered to be paid out to the respondent to account of fixed costs.

B *Applications dismissed with costs.*

Reported by Kanesh Sundrum

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